143

No. 09-363

Supreme Court, U.S.
FILED
OCT 28 2009
OFFICE OF THE CLERK

In The Supreme Court of the United States

KEVIN COOPER,

Petitioner,

v.

ROBERT K. WONG, ACTING WARDEN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* CACJ AND CPDA IN SUPPORT OF PETITIONER KEVIN COOPER'S PETITION FOR WRIT OF CERTIORARI

*JOHN PHILIPSBORN
ANN C. MOORMAN
CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE
507 Polk Street, Ste 350
San Francisco, CA 94102
415-771-3801 (tel)
415-771-3218 (fax)
JPhilipsbo@aol.com

MICHAEL MCMAHON
CALIFORNIA PUBLIC DEFENDERS ASSOCIATION
800 S. Victoria Avenue
HOJ-207
Ventura, CA 93009
805-477-7114 (tel)
805-648-9220 (fax)

Counsel for Amici Curiae

**Counsel of Record*

In Support of Petitioner

OCTOBER 28, 2009

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

NOTICE, CONSENT, AND INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 3

A. The Circuit Court Rulings Conflict in Addressing Successor Petitions that Include Claims Raised Under *Brady v. Maryland* .. 4

B. The Treatment of *Brady* Claims Raised in Successor Petitions Presents an Important and Recurring Federal Question Involving Principles of Fundamental Fairness 6

1. *Brady* Violations Occur on a Regular Basis, and Frequently Bear Directly on Fundamental Questions of Innocence 6

2. Petitioner – and Other Similarly Situated Defendants in California – Did Not Have Access to State Court Discovery to Uncover the *Brady* Violations in this Case Before Filing the First Federal Habeas Corpus Petition 13

3. AEDPA Should Not Be Interpreted to Curtain a Defendant's Rights Based on the Government's Failure to Meet Its Constitutional and Ethical Duties 14

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Banks v. Dretke, 540 U.S. 668 (2004).....4, 14

Berger v. United States, 295 S.Ct. 78 (1935) 15

Bracy v. Gramley, 520 U.S. 899 (1997).....14

Brady v. Maryland, 373 U.S. 83 (1963).....*passim*

Cone v. Bell, __ U.S. ___, 129 S.Ct. 1769 (2009).....14, 15

Douglas v. Workman, 560 F.3d 1156 5

Harris v. Nelson, 394 U.S. 286 (1969).....14

In re Steele, 32 Cal.4th 682, 10 Cal.Rptr.3d 536 (2004).....13

People v. Gonzales, 51 Cal.3d 1179, 800 P.2d 1159 (1990).....14

Strickler v. Greene, 527 U.S. 263 (1999).....15

Thompson v. Connick, 553 F.3d 836 (5th Cir. 2008).....11, 12

Thompson v. Connick, 578 F.3d 293 (5th Cir. 2009).....11

Tompkins v. Secretary, Department of Corrections, 557 F.3d 1257 (11th Cir. 2009).....5

United States v. Lopez, 577 F.3d 1053 (9th Cir. 2009).....4, 5

Van de Kamp v. Goldstein, ___ U.S. ___, 129 S.Ct. 855 (2009).....9

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1983 9

28 U.S.C. § 2244(b)(2).....3, 4

28 U.S.C. § 2255 (h)(1) 5

Cal. Pen. Code § 1054.9(b).....13

EXECUTIVE MATERIAL

H.R. Rep. No. 104-518 (1996).....4

REPORTS

Ken Armstrong and Maurice Possley, *The Verdict: Dishonor; Trial & Error: How Prosecutors Sacrifice Justice to Win* (Pt. 1), CHI. TRIB., Jan. 10, 1999 10

California Commission on the Fair Administration of Justice, Report and Recommendations on Compliance with the Prosecutorial Duty to Disclose Exculpatory Evidence (March 6, 2008), http://www.ccfaj.org/rr-pros-official.html 9, 10

Kathleen Ridolfi, California Commission on the Fair Administration of Justice, Report and Recommendations on Reporting Misconduct: Prosecutorial Misconduct: A Systemic Review (October 18, 2007), http://www.ccfaj.org/rr-pros-official.html 8, 9

TABLE OF AUTHORITIES – Continued

Page

Scheck, Neufeld & Dwyer, California Commission on the Fair Administration of Justice, Report and Recommendations on Administration of Justice: *Actual Innocence*, 2003, http://www.ccfaj.org/rr-pros-official.html 9

RULES

Sup. Ct. R. 37 2

NOTICE, CONSENT, AND INTEREST OF THE *AMICI CURIAE*[1]

California Attorneys for Criminal Justice ("CACJ") is a nonprofit California corporation. According to Article IV of its bylaws, CACJ was formed to achieve certain objectives including "to defend the rights of persons as guaranteed by the United States Constitution, the Constitution of the State of California and other applicable law." CACJ is administered by a Board of Governors consisting of criminal defense lawyers practicing within the State of California. The organization has approximately 2,000 members, primarily criminal defense lawyers practicing before federal and state courts. These lawyers are employed throughout the State both in the public and private sectors. CACJ has often appeared before this Court, the California Supreme Court, and the Courts of Appeal in California on issues of importance to its membership.

The California Public Defender's Association ("CPDA") is also a nonprofit California corporation. CPDA's membership of some 4,000 public defenders and lawyers in private practice makes it an important voice of the criminal defense bar. CPDA

---

[1] The undersigned, as chairs of the *amicus* committee of CACJ of the *amicus* committee of CPDA, certify to this Court that no counsel for a party authored this brief in whole or in part, and no party to this litigation or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. Written consent was granted, and is filed herewith.

provides continuing legal education for defense lawyers, and has been recognized as a provider of such education for almost 40 years. CPDA also regular appears as *amicus curiae* in matters of importance to its membership, and has appeared in that capacity in this Court on numerous occasions.

Petitioner's case permits this Court to provide the lower courts with guidance as to the legal standard that applies to a *Brady* claim raised in a successor habeas corpus petition when the state has withheld information supporting that claim, and the claim would have been meritorious had the information been disclosed prior to petitioner's filing of an initial habeas corpus petition. CACJ's and CPDA's members have an interest in the issues raised in this case, which arise frequently and implicate the fundamental rights of the criminal defendants whom their members regularly represent.

The Innocence Project provided notice to counsel of record under Rule 37 of the Supreme Court Rules of the intent to file an *amicus* brief. Thereafter, CACJ requested further consent from the Attorney General of California to file a separate brief, which is intended to allow CACJ and CPDA to express the interest of the California criminal defense bar in this matter.

SUMMARY OF ARGUMENT

The circuit and district courts would benefit from this Court's guidance in addressing successor petitions with claims raised under *Brady v. Maryland*, 373 U.S. 83 (1963). There is a conflict in the circuits on the issue of whether an exception to 28 U.S.C. § 2244(b)(2) should exist for *Brady* violations. This conflict requires resolution because *Brady* violations – which often bear on questions of innocence – continue to be widespread. Petitioner, and others similarly situated, did not have access to state court discovery to assist him in ferreting out the multiple *Brady* violations that occurred in this case. The state should not be permitted to benefit under the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA") from its own misconduct in withholding material, exculpatory evidence.

ARGUMENT

Certiorari should be granted so lower courts may obtain the Court's guidance on the critical issue of what legal standard applies to a *Brady* claim raised in a successor habeas corpus petition, when the state has withheld information supporting that claim and the claim would have been meritorious had the information been disclosed prior to petitioner's filing an initial habeas corpus petition.

A. The Circuit Court Rulings Conflict in Addressing Successor Petitions that Include Claims Raised Under *Brady v. Maryland*

The purpose of AEDPA's successor petition provisions was to sanction lack of diligence by the defense. *See* H.R. Rep. No. 104-518, at 111 (1996) (AEDPA was enacted to "curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of *unnecessary* delay and abuse in capital cases.") (Emphasis supplied.) This purpose is not served when the defendant is sanctioned for the failure by the *state* to comply with its constitutional obligations under *Brady*, though that is the very effect of a strict application of § 2244(b)(2) to *Brady* claims raised in successor petitions. 28 U.S.C. § 2244(b)(2) requires such a petitioner to demonstrate there is "clear and convincing" evidence that but for the *Brady* violation, "no reasonable factfinder would have found the applicant guilty of the underlying offense." This standard is far more onerous than the standard for a *Brady* claim in an initial petition. *See Banks v. Dretke*, 540 U.S. 668, 699 (2004) (habeas corpus petitioner is entitled to relief where there is a "reasonable probability of a different result" had exculpatory evidence the state failed to disclose been available at trial).

Recognizing the unfairness inherent in applying a higher standard to *Brady* claims in successor petitions – in essence, penalizing the defendant for misconduct by the state – some courts have suggested an exception to § 2244(b)(2) should apply to *Brady* violations. *See, e.g., United States v. Lopez*, 577 F.3d

1053, 1064 (9th Cir. 2009);[2] *Douglas v. Workman*, 560 F.3d 1156, 1187 (10th Cir. 2009).[3] Others have not recognized the need for such an exception. *See, e.g.*, *Tompkins v. Secretary, Department of Corrections*, 557

---

[2] In *Lopez*, the Ninth Circuit considered the application of § 2255(h)(1), a provision analogous to § 2244(b)(2), to *Brady* claims raised in successor petitions. The Ninth Circuit observed:

> Given the nature of *Brady* claims, petitioners often may not be at fault for failing to raise the claim in their first habeas petition. It is the prosecutor who violates *Brady*'s disclosure obligations by not providing favorable evidence to the defense, and that prosecutorial error may not surface until petitioner's first habeas petition has already been resolved.

Lopez, 577 F.3d at 1064. The Ninth Circuit further noted:

> If § 2255(h) applies literally to every second-in-time *Brady* claim, federal courts would be unable to resolve an entire subset of meritorious *Brady* claims: those where petitioner can show the suppressed evidence establishes a *reasonable probability* of a different result and is therefore material under *Brady*, but cannot, under § 2255(h)(1)'s more demanding prejudice standard, show that the evidence establishes by *clear and convincing evidence* that no reasonable juror would have voted to convict petitioner.

Id., emphasis in original. Without deciding the issue, the Ninth Circuit concluded the petitioner in *Lopez* had not met the materiality requirement for his *Brady* claims. *Id.* at 1066.

[3] In *Douglas*, the Tenth Circuit, recognizing the unfairness of the application of § 2244(b) to a petitioner who, through "no fault of his own," had been unable to include a *Brady* claim in his first petition, upheld the district court's decision to treat Douglas's *Brady* claim as a supplement to his initial petition, rather than as a claim in a successor petition. *Id.* at 1171, 1187.

F.3d 1257, 1260 (11th Cir. 2009). As a result, there is a split in the circuits.

This Court should grant certiorari to provide definitive guidance to the lower courts in the proper standard to apply to *Brady* claims in successor petitions.

B. The Treatment of *Brady* Claims Raised in Successor Petitions Presents an Important and Recurring Federal Question Involving Principles of Fundamental Fairness

In addition to dividing the circuit courts on how to treat *Brady* claims raised in successor petitions, this issue also raises a question of fundamental fairness affecting criminal defendants, prosecution offices, and law enforcement agencies throughout the country: should the state be rewarded – and criminal defendants punished – for deliberate, or negligent, withholding of material exculpatory evidence until after a first federal habeas corpus petition has been filed?

1. *Brady* Violations Occur on a Regular Basis, and Frequently Bear Directly on Fundamental Questions of Innocence

The questions presented here would be less compelling if the withholding of relevant exculpatory evidence were a rarity. However, there is reliable, and compelling, evidence that *Brady* violations are disturbingly common. The California Commission on the

Fair Administration of Justice, a non-partisan commission created by the California Senate to study the California criminal justice system (the "Commission"),[4] recently solicited a study of the problem:

> The Commission asked its researchers to analyze every reported appellate decision in California, whether published or unpublished, where the Courts addressed a claim of prosecutorial misconduct or defense lawyer incompetence for the ten year period ending in 2006. . . .
>
> Professor Cookie [Kathleen] Ridolfi of Santa Clara University School of Law located 2,130 California cases in which claims

---

[4] The Commission was created by Senate Resolution No. 44 of the 2003-04 Session of the California State Senate, adopted on August 27, 2004. Senate Resolution 44 provided, in part, that the Commission would have the following duties:

> (1) To study and review the administration of criminal justice in California to determine the extent to which that process has failed in the past, resulting in wrongful executions or the wrongful conviction of innocent persons.
>
> (2) To examine ways of providing safeguards and making improvements in the way the criminal justice system functions.
>
> (3) To make any recommendations and proposals designed to further ensure that the application and administration of criminal justice in California is just, fair, and accurate.

Senate Resolution No. 44 (Cal. 2004). The Commission consisted of members involved in criminal prosecution, defense, and adjudication. *See* http://www.ccfaj.org/membership.html.

> of prosecutorial misconduct were raised. Courts concluded that prosecutorial misconduct did occur in 443 of these cases, or 21%. In 390 of these cases, however, the court concluded the misconduct was harmless error and affirmed the conviction. In 53 cases, the misconduct resulted in a reversal of the conviction. *The most common forms of misconduct found were failing to disclose exculpatory evidence and improper argument.* Ridolfi, Prosecutorial Misconduct: A Systemic Review.

California Commission on the Fair Administration of Justice, Report and Recommendations on Reporting Misconduct at 2-3 (Oct. 18, 2007), http://www.ccfaj.org/rr-pros-official.html (follow California Commission on the Fair Administration of Justice: Final Report and Recommendations on Reporting Misconduct hyperlink) (emphasis added). Professor Ridolfi found that of the 443 cases in which prosecutorial misconduct did occur, 129 involved *Brady* violations. Kathleen Ridolfi, Prosecutorial Misconduct: A Systemic Review at 9, http://www.cpda.org/publicarea/CCFAJ/Professional-Responsibility-DAs-and-Defenders/CCFAJ-Official-Reports-Professional-Responsibility-of-Prosecutors-and-Defenders.html (follow Prosecutorial Misconduct – A Systemic Review Prof. Cookie Ridolfi, Santa Clara University School of Law Download Study hyperlink).

The Commission further noted that both prosecutorial misconduct and defense lawyer ineffective representation "have been identified among the leading causes of wrongful convictions. A study of the first 74 DNA exonerations in the United States found that

prosecutorial misconduct was a factor in 45% of the cases. . . ." California Commission on the Fair Administration of Justice, Report and Recommendations on Reporting Misconduct at 3, n.1. (Emphasis added, citing Scheck, Neufeld & Dwyer, *Actual Innocence*, 365 (2003).)

Despite these multiple instances of misconduct, prosecutors are rarely reported to the State Bar, leaving open the question of the extent to which prosecutors committing *Brady* violations in California face any repercussions. California Commission on the Fair Administration of Justice, Report and Recommendations on Reporting Misconduct at 4-6; *cf., Van de Kamp v. Goldstein*, ___ U.S. ___, 129 S.Ct. 855 (2009) (prosecutors are absolutely immune from liability under 28 U.S.C. § 1983 for alleged general failures in supervision, training, and information-system management – even if they resulted in a *Brady* violation instrumental in plaintiff's wrongful conviction for murder).

In an attempt to address continuing, widespread *Brady* violations in California, the Commission made several recommendations regarding the establishment of district attorney and law enforcement agency policies and training governing *Brady* compliance. *See* California Commission on the Fair Administration of Justice, Report and Recommendations on Compliance with the Prosecutorial Duty to Disclose Exculpatory Evidence at 15-17 (March 6, 2008), http://www.ccfaj.org/rr-pros-official.html (follow California Commission on the Fair Administration of Justice:

Final Report and Recommendations on Compliance with the Prosecutorial Duty to Disclose Exculpatory Evidence hyperlink).

The California Commission on the Fair Administration of Justice was chaired by a former Attorney General of California, and included a wide range of representatives of the components of California's criminal justice processes, including the current Attorney General of California, a member of the Federal judiciary, Police Department Chiefs, District Attorneys, Defenders, academics, and others. The Commission heard from a wide variety of witnesses, and collected numerous publications and materials relevant to its work. Its findings were published in a *Final Report*, where the subject of the breadth of disclosures necessary to the fair administration of justice was discussed from several perspectives, from specific subject matters such as eyewitness identification to the professional responsibilities of lawyers involved in the criminal courts.

Brady violations, along with failures by the state to adequately protect against them, are not infrequent throughout the United States. *See* Ken Armstrong and Maurice Possley, *The Verdict: Dishonor; Trial & Error: How Prosecutors Sacrifice Justice to Win* (Pt. 1), CHI. TRIB., Jan. 10, 1999, at 1C (Investigative reporters Ken Armstrong and Maurice Possley reviewed court records, appellate rulings, and lawyer disciplinary records in cases across the country and found that between 1963 and 1999 at least 381 defendants had a homicide conviction overturned

because prosecutors concealed evidence of innocence or presented evidence they knew to be false).

Indeed, members of CACJ and CPDA have frequently encountered prosecutorial failures to disclose material evidence favorable to the defense. Sometimes the errors have been inadvertent; the prosecutor was not aware that the undisclosed document was in the possession of some law enforcement agency. However, on other occasions the evidence demonstrated the intentional suppression of evidence the prosecutor knew, or reasonably should have known, would be beneficial to the defense. Either permutation results in a distortion of the truth-finding function of the trial courts. Such misconduct may not come to light for many years, and it may come to light as the result of fortuity. *Amici* respectfully submit that the legal system supervised by this Court must have the opportunity to correct the wrong that has been done. It would be intolerable for the system to erect procedural obstacles so high that a wronged defendant is thereby precluded from obtaining the relief to which he or she should be entitled.

Recently, in *Thompson v. Connick*, 578 F.3d 293 (5th Cir. 2009), the Fifth Circuit affirmed a $14 million jury verdict against the Orleans Parish District Attorney's Office and its former District Attorney for their "deliberate indifference" to the need to train prosecutors to comply with the dictates of *Brady*. As reported in the vacated panel opinion, *Thompson v. Connick*, 553 F.3d 836 (5th Cir. 2008), in 1985 the

suppression of exculpatory blood evidence led to plaintiff's conviction in an attempted robbery case, a wrongful conviction that kept him from testifying in his capital trial a few weeks later. After the *Brady* error came to light in 1999 and plaintiff's innocence in the attempted robbery was proved, the capital conviction was reversed in 2002. Plaintiff was retried for murder and acquitted. *Id.* at 843-846. Plaintiff was imprisoned for eighteen years, fourteen in solitary confinement on death row at Angola Prison, where he "spent twenty-three hours a day in a six-by-nine-foot cell with no windows or air conditioning"; he had six execution dates and came within one month of being executed; and the jury that ultimately acquitted him did so after deliberating only 35 minutes. *Id.* at 846, 865.

As illustrated by the egregious details of the *Thompson* case, *Brady* materials frequently bear directly on fundamental questions of innocence. At a time when there are continued concerns about the unreliability of death judgments and the possibility of executing innocent defendants, imposing an artificial and unreasonable barrier to pursuing the truth regarding the defendant's alleged offense and conviction is contrary to the intent of the AEDPA and a violation of constitutional due process.

2. Petitioner – and Other Similarly Situated Defendants in California – Did Not Have Access to State Court Discovery to Uncover the *Brady* Violations in this Case Before Filing the First Federal Habeas Corpus Petition

Petitioner, and others like him, had no access to state court discovery at the time that he litigated his state habeas corpus petition. Discovery in connection with California state post-conviction petitions did not become available as a matter of California procedural law until January 1, 2003, when California Penal Code § 1054.9 became effective. This statute provides for limited post-conviction discovery in cases involving sentences of death or life without the possibility of parole. In certain circumstances the statute allows such defendants access to "discovery materials" which are defined as "materials in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at time of trial." Cal. Pen. Code § 1054.9(b).

The California Supreme Court clarified the extent of discovery under § 1054.9 in its opinion in *In re Steele*, 32 Cal.4th 682, 10 Cal.Rptr.3d 536 (2004), issued on March 3, 2004.

Thus, petitioner – and others like him who filed state habeas corpus petitions before the enactment of § 1054.9 and the decision in *Steele* – had *no* means of compelling discovery in state post-conviction proceedings. Such petitioners therefore had no reliable access in California state courts, as a matter of

discovery rights, to evidence of *Brady* violations. *People v. Gonzales*, 51 Cal.3d 1179, 1260-1261, 800 P. 2d 1159 (1990).

Nor is such discovery automatically available in federal court. Without "good cause" to request it, the federal habeas corpus petitioner is not permitted access to discovery. *Bracy v. Gramley*, 520 U.S. 899, 908-909 (1997) (petitioner must raise "specific allegations" to support his claims for relief before he is entitled to discovery in habeas corpus proceedings, quoting *Harris v. Nelson*, 394 U.S. 286, 300 (1969)).

The defense should not be precluded from raising a *Brady* claim in a successor petition based upon undisclosed information of which the defense was unaware, and which the prosecution failed to disclose pre-trial and could not be compelled to disclose in state or federal post-conviction proceedings. As this Court has observed, "[a] rule thus declaring 'prosecutor may hide, defendant must seek' is not tenable in a system constitutionally bound to accord defendants due process." *Banks*, 540 U.S. at 696.

3. AEDPA Should Not Be Interpreted to Curtail a Defendant's Rights Based on the Government's Failure to Meet Its Constitutional and Ethical Duties

In *Cone v. Bell*, ___ U.S. ___, 129 S.Ct. 1769 (2009), this Court granted penalty relief on a *Brady* claim, reiterating the prosecutor's constitutional and ethical duties and again holding it is the state's "duty

to refrain from improper methods calculated to produce a wrongful conviction." *Cone*, 129 S.Ct. at 1782 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). As the Court further observed, "the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations." *Cone*, 129 S.Ct. at 1783 n.15 (citing, *inter alia*, ABA Model Rule of Professional Conduct 3.8(d) (2008)). The Court concluded, "[a]s we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure." *Cone*, 129 S.Ct. at 1783 n.15.

To allow the state's representatives to violate their ethical obligations and duties under *Brady* to disclose exculpatory evidence, to stall until after a first federal petition has been filed before producing such evidence, and then to penalize the defendant both for the state's transgressions and its delay, violates notions of due process and fundamental fairness, which ought to be the driving principle here as it was in *Strickler v. Greene*, 527 U.S. 263 (1999), where the Court held, pre-AEDPA, that the *Brady* violation itself established cause for petitioner's failure to raise his *Brady* claim prior to pursuing federal habeas corpus relief.

CONCLUSION

Certiorari should be granted to provide the lower courts with guidance on the critical and recurring issue of the standard to be applied to *Brady* violations raised in successor habeas corpus petitions, where the *Brady* material is not disclosed by the state until after an initial habeas corpus petition has been filed.

Respectfully submitted,

*JOHN PHILIPSBORN
ANN C. MOORMAN
CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE
507 Polk Street, Ste 350
San Francisco, CA 94102
415-771-3801 (tel)
415-771-3218 (fax)
JPhilipsbo@aol.com

MICHAEL MCMAHON
CALIFORNIA PUBLIC DEFENDERS ASSOCIATION
800 S. Victoria Avenue
HOJ-207
Ventura, CA 93009
805-477-7114 (tel)
805-648-9220 (fax)

Counsel for Amici Curiae

**Counsel of Record*

In Support of Petitioner

OCTOBER 28, 2009